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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive.

Defendants,

AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS

Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864]

Assigned for all purposes to the Honorable Peter H. Kirwan

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS AS TO SAN JOSE POLICE OFFICERS ASSOCIATION AND AFSCME

Date: January 29, 2013
Time: 9:00 a.m.
Dept: 8

BY FAX

Complaint Filed: June 6, 2012
Trial Date: None Set

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I. INTRODUCTION

Plaintiffs American Federation of State, County, and Municipal Employees, Local 101 ("AFSCME") and San Jose Police Officers Association ("SJPOA") have put forth exceedingly novel legal theories, but they have failed to proffer any authorities to demonstrate they can seek relief under any of the claims challenged by this motion. AFSCME, for example, has failed to identify any convincing legal authority that would classify the voter-approved pension reform measure ("Measure B") as a bill of attainder or tax. Both parties have failed to show authority for their unique interpretations of the right to petition, freedom of speech, and the "threat, intimidation, or coercion" requirement of the Bane Act that would bring Measure B within their purview. Both plaintiffs also mis-apprehend the meaning of "actual controversy," and cannot show a ruling that Measure B conflicts with the Pension Protection Act would be anything other than an advisory opinion. SJPOA's challenge to a portion of Measure B that addresses what to do in the event of an adverse judgment also seeks an advisory opinion.

Accordingly, Defendant City of San Jose ("City") respectfully requests that the Court dismiss AFSCME's second, fifth, sixth, and seventh causes of action brought against both the City and City Manager Debra Figone, and SJPOA's fourth, fifth and eighth causes of action against the City. The City also requests that the Court dismiss plaintiffs' California Civil Code section 52.1 claims, given that they were incorporated in all of plaintiffs' constitutional claims, including those at issue in this motion. Dismissing these claims will not dispose of each plaintiff's entire lawsuit. Rather, it will pare them down to the core constitutional challenges to Measure B asserted by all of the plaintiffs in these consolidated cases and that will be addressed in upcoming motions.

II. ARGUMENT

Plaintiffs are bringing facial challenges to Measure B, which means "only the text of the measure itself" is considered, and that to prevail, plaintiffs "'must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'" *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995) (citation omitted). Plaintiffs cannot meet this standard.

A. Measure B is Not a Bill Of Attainder as Alleged in AFSCME's Second Cause of Action

Measure B is not a "trial by legislature" contemplated by the constitutional prohibition against bills of attainder. "A bill of attainder is 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'" *Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495 (9th Cir. 1993) (citation omitted.) "A statute inflicts forbidden punishment when it: (1) falls within the historical meaning of legislative punishment; (2) furthers no nonpunitive legislative goals; and (3) evinces Congress' intent to punish, as reflected in the legislative record." *Id.* As stated in the City's opening brief, AFSCME cannot meet any of these tests because Measure B is 1) not the type of legislation historically deemed an unlawful bill of attainder; 2) the "declared purpose" is "nonpunitive;" and 3) the legislative record does not evince a legislative intent to punish anyone for any alleged misconduct. *Legislature of the State of California v. Eu*, 54 Cal. 3d 492, 525-527 (1991); *Tobe*, 9 Cal. 4th at 1095.

Rather than trying to meet any of the three tests, AFSCME discusses several attainder cases, but they do nothing to change this analysis and in no way support AFSCME's contention that Measure B is punishment. It cites *Flemming v. Nestor*, 363 U.S. 603, 613-621 (1960), but the Supreme Court there did *not* find that amendments to the Social Security Act (that cut off a plaintiff's benefits because he was deported for having been a member of the Communist Party decades earlier) was an unlawful bill of attainder. It declined to find that Congress had a punitive purpose, explaining that "only the clearest proof could suffice," warning against going "behind objective manifestations" of intent, and stating that evidence of "punitive intent" must be "unmistakable." *Id.* at 617, 619. AFSCME also cites *Atonio*, which also rejected an attainder claim, even where a section of the Civil Rights Act of 1991 specifically excluded the *Atonio* plaintiffs from the litigation benefits of the Act, because there was nothing in the record showing "Congress intended to punish the workers for filing and maintaining this action." *Atonio*, 10 F.3d at 1491-1492, fn. 3, 1496. AFSCME also relies on cases outside of California. See *Club Misty v. Laski,* 208 F.3d 615, 617 (7th Cir. 2010) (voiced "skepticism" that a law letting neighbors void a bar's liquor license was a bill of attainder); *Crain v. City of Mountain Home,* 611 F.2d 726, 728-729 (8th Cir. 1979)

(attainder where ordinance prohibited the City Attorney from engaging in his profession); *Consolidated Edison v. Pataki*, 292 F.3d 338, 344, 346-355 (2d Cir. 2002) (attainder where the statute *expressly* declared Con. Edison's negligence for a power outage and inflicted punishment on the utility by providing that it could not recover outage-related costs from ratepayers); *ACORN v. United States*, 618 F.3d 125, 132, 138-142 (2d Cir. 2010) (*no* attainder even where Congress had explicitly excluded ACORN from an appropriations bill and directed an audit for misuse of federal funds because "the appropriations laws themselves do not mention ACORN's guilt in any way"). There is no finding of guilt in Measure B, nor is there any "unmistakable" evidence of punitive intent. These cases do not help AFSCME.

Finally, AFSCME attempts to differentiate the California cases cited by the City, but can provide no California authority *supporting* its claim that Measure B qualifies as a bill of attainder. (AFSCME Opp. at 2:5-9, 3:8-11, 4:8-25.) In discussing *Flournoy*, a case examined at length in the City's opening brief, AFSCME quotes a sentence out of context to infer that a decrease in compensation would be an attainder. (AFSCME Opp. at 4:11-15, quoting *California State Employees' Assn. v. Flournoy,* 32 Cal. App. 3d 219, 229 (1973).) That is not what the opinion held, as illustrated by the sentence immediately prior to that quoted by AFSCME: "It is apparent that even legislation which entirely withholds salaries for a public office or class of public employees does not approach, in penal character, the statute held by the United States Supreme Court in *Lovett* to be one which 'operates as a legislative decree of perpetual exclusion' from a chosen vocation'" in violation of the attainder clause. *Flournoy*, 32 Cal. App. 3d at 229, quoting *United States v. Lovett*, 328 U.S. 303, 316 (1946). Similarly, in discussing *Eu*, AFSCME acknowledges that the Court did not find attainder, and does not attempt to use *Eu* to support its claim of attainder here. (AFSCME Opp. at 4:19-25.) There is nothing about any of these California cases that supports AFSCME's claim that Measure B *punished* its members and AFSCME's claim should thus be dismissed.

B. Measure B Does Not Violate the Right to Petition or Freedom of Speech, as Alleged in AFSCME's Sixth and SJPOA's Fourth Causes of Action

Under Measure B, the voters sought to achieve cost savings by adjusting current employees' compensation "through additional retirement contributions" to "amortize any pension unfunded

liabilities..." (RJN, Exh. A, 1506-A(b).) Measure B's Savings Clause provides that if that means for achieving savings "is determined to be illegal, invalid or unenforceable as to Current Employees," then "an equivalent amount of savings shall be obtained through pay reductions." (RJN, Exh. A, 1514-A.) Although at least five employee/union lawsuits have been filed and although Measure B does not include any provisions designed to deter access to the courts, AFSCME and the SJPOA both contend that because employee pay will be decreased if they successfully challenge the increased contribution rates, then their "access to the courts" has been chilled in violation of the constitutional right to petition. (AFSCME Opp. at 5:3-9; SJPOA 3:2-5.)

Although plaintiffs express some confusion on this point, since 2011, the courts have clarified that to show Measure B violates the right to petition or free speech, plaintiffs must show 1) that their litigation challenging Measure B is "on a matter of public concern;" and 2) that Measure B "cause[s] some incidental restriction on speech protected by the First Amendment." *Vargas v. City of Salinas*, 200 Cal. App. 4th 1331, 1342, 1345-46 (2011); *Borough of Duryea v. Guarnieri*, 564 U.S. __, 131 S. Ct. 2488, 2494-2495, 2500-2501 (2011). If they can make that showing, there is still no petition/speech violation if Measure B "was 'narrowly drawn to achieve a substantial governmental interest that is content neutral and unrelated to the suppression of the exercise of First Amendment rights.'" *Vargas*, 200 Cal. App. 4th at 1346 (citation omitted). "The inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n. 7 (1983).

To determine whether the litigation is on a matter of public concern, courts "'focus on the point of the speech,' looking to such factors as the 'employee's motivation and the audience chosen for the speech.'" *White v. Nevada*, 312 Fed. Appx. 896, 897 (9th Cir. 2009), quoting *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1223 (9th Cir. 1996) and *Gilbrook v. City of Westminster*, 177 F.3d 839, 866 (9th Cir. 1999). Thus, contrary to AFSCME's statement that Measure B itself involves a matter of public concern, the question is whether AFSCME and SJPOA's *lawsuits* – the speech that is to be protected – is on a matter of public concern. Here, the "point" of the litigation, and the "motivation" for bringing it is to overturn Measure B so that plaintiffs' members will not have decreased compensation through either increased retirement contributions or a corresponding cut in pay, a matter of private economic concern. The "audience" is the Court, which has the authority to resolve

the employees' personal grievances over the effect of Measure B on their compensation. A lawsuit in itself is not protected. *Rendish v. City of Tacoma*, 123 F.3d 1216, 1220-21 (9th Cir. 1997) (First Amendment is "concerned about political expression and not about the general right to bring suit").

SJPOA relies on *McKinley v. Eloy*, 705 F.2d 1110, 1114-1115 (9th Cir. 1983), where a probationary police officer was fired for speaking at city council meetings and on television about police compensation "and, more generally, with the working relationship between the police union and elected city officials." But in *White v. Nevada*, the Ninth Circuit cited *McKinley* to reject the contention that "speaking out against certain payroll policies regarding overtime pay" was a matter of public concern: "Though widespread problems of compensation and funding can constitute matters of public concern if they affect general functioning or safety, see *McKinley*, 705 F.2d at 1114-15, plaintiffs here have not alleged such facts." *White*, 312 Fed.Appx. at 897. Here, unlike *McKinley*, this case is solely about plaintiffs' efforts to overturn Measure B's effects on their employment benefits and does not deal more generally with the functioning of any City department.

Even if this litigation is deemed to address matters of public concern, and even if Measure B's Savings Clause is deemed to have chilled "legitimate petitioning activity," plaintiffs still cannot prevail under this cause of action because any alleged chill in litigating Measure B "is merely incidental to and outweighed by the significant governmental interests the statute is designed to protect." *Vargas*, 200 Cal. App. 4th at 1346; *Rendish*, 123 F.3d at 1219, 1225 (assistant city attorney's lawsuit on a matter of public concern did not outweigh the "'interest of the City in promoting efficient delivery of public services'") (citation omitted). Here, as stated in Measure B itself, the governmental purpose is to protect essential City services as well as the City's employment benefit programs. (RJN, Exh. A, § 1501-A.) There is no intent to block access to the courts and, of course, Measure B has not actually blocked access to the myriad plaintiffs who are currently challenging it in this Court.

Although it was a due process rather than a petition/speech case, plaintiffs rely on *California Teachers Assn. v. State of California*, 20 Cal. 4th 327 (1999) which held that a statute requiring teachers challenging disciplinary action to pay half of the costs of hearings violated due process because it had "no purpose other than to chill the exercise of the right of teachers to demand a

hearing before they are dismissed or suspended." *Id.* at 338, 357. Unlike the statute in *California Teachers*, Measure B's Savings Clause has a purpose unrelated to chilling the exercise of any right, which is to achieve savings to "protect essential City services and "the continuation of fair post-employment benefits for its workers." (RJN, Exh. A, § 1501-A.)

C. Measure B is Not a Tax At All, Let Alone One That Violates Equal Protection, as Alleged in AFSCME's Seventh Cause of Action

Measure B is not a tax. AFSCME has cited no legal authority – and can make no plausible argument – that a charter city's decision to decrease its own employees' compensation is a tax on its employees. Rather, AFSCME cites cases that define taxes for purposes of priority in bankruptcy cases as well as local government tax cases regarding how to characterize taxes that no one actually disputed were taxes. (AFSCME Opp. at 6:25-7:21, quoting, e.g., *Weekes v. City of Oakland*, 21 Cal.3d 386, 392 (1978).) There are simply no cases interpreting a public entity's compensation decisions as a tax, and with good reason: Doing so would bring compensation decisions, and corresponding local government budgeting decisions, within the realm of California's complicated tax limitations and would thereby eviscerate the plenary authority that Charter cities enjoy over both employee compensation and city budgets. *State Bldg. & Constr. Trades Council of Cal., AFL-CIO v. City of Vista*, 54 Cal. 4th 547, 555, 562 and n.3, 563 (2012); Cal. Const., Art. XI, § 5.

Even if Measure B is somehow deemed a tax for argument's sake, it would not violate equal protection. Although the California Supreme Court applies "a rational basis analysis" to tax claims, AFSCME argues a "strict-scrutiny" analysis should be used instead. *Jensen v. Franchise Tax Board,* 178 Cal. App. 4th 426, 435-436 (2009). (AFSCME Opp. at 8:9-15, 9:6-28.) AFSCME did not plead factual allegations in its complaint that would trigger a strict-scrutiny analysis, which are "[c]lassifications that disadvantage a 'suspect class' or impinge upon the exercise of a 'fundamental right.'" *Id.* at 434. (AFSCME Complaint, ¶¶ 169, 172-174 [defining class as City employees upon whom Measure B "imposes liability … for the support of another not obligated to support such person"].) Strict scrutiny would not apply here because public employees have "'none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness

as to command extraordinary protection from the majoritarian political process.'" *Id.* at 434-435, quoting *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973). Nor does Measure B impinge on any fundamental right, given that the "tax" is alleged to *fund* "already-incurred" pension liabilities for both current and future retirees, rather than take such benefits away. (AFSCME Complaint, ¶ 169.)

Applying rational basis analysis to AFSCME's allegations that Measure B 1) requires employees to share the burden of others' pensions and retiree health costs, and 2) exempts City residents who are not City employees, Measure B does not run afoul of the equal protection clause. See *Weekes*, 21 Cal.3d at 390, 398 ("occupation tax" on wages of people employed in Oakland did not "discriminate unreasonably" between "Oakland residents who are employed in the city" and those "employed elsewhere"); *Jensen*, 178 Cal.App.4th at 437 ("there is no need to contrive a link between the taxpayer and the services being funded"). (AFSCME Complaint, ¶¶ 167, 169, 171, 174: AFSCME Opp. at 9:1-2, 25-26.) Because these purported classifications are "rationally related to achievement of [the] legitimate state purpose" of bringing down employee costs so that the City may provide services to its residents and taxpayers while preserving reasonable long-term post-employment benefits, AFSCME's seventh cause of action must be dismissed.[1] *Id.* at 435-436.

D. Plaintiffs Cannot Use The Bane Act for Redress of Constitutional Claims

Procedurally, both AFSCME and the SJPOA assert "associational standing" to bring a Civil Code section 52.1 claim. Although there is disagreement over whether a private plaintiff may bring a Section 52.1 claim in a representative capacity, the only *published* decision limits standing to those listed in the statute. *Bay Area Rapid Transit Dist. v. Superior Court*, 38 Cal. App. 4th 141, 142, 144, 44 Cal. Rptr. 2d 887 (1995) (Bane Act "is limited to plaintiffs who themselves have been the subject of violence or threats"); compare *Dang v. City of Garden Grove* (Case No. SACV 10-00338 DOC) 2011 U.S. Dist. LEXIS 85949, **32-33 (C.D. Cal. August 2, 2011) (following *BART*, and allowing successors-in-interest to pursue claims pursuant to Cal. Code Civ. Pro. §§ 377.20(a), 377.30);

1 AFSCME asserts that Measure B is a tax that violates Government Code section 50026 and [Rev. and Tax Code section] 17041.5, but this is irrelevant to the equal protection claim and was not alleged in the complaint. (AFSCME Opp. at 9:19-10:3.) Any leave to amend this claim would be futile, given that Measure B is not a tax and that the referenced provisions most likely do not apply here or to charter cities generally. See *Weekes*, 21 Cal.3d at 397-398.

Taggart v. Solano County (Case No. CIV-S-05-0783 DFL) 2005 US Dist LEXIS 31799, **14-15 (E.D. Cal., December 6, 2005) ("Section 52.1(b) does not authorize a representative action"); but see *Craft v. County of San Bernardino* (EDCV 05-359-SGL) 2006 US Dist LEXIS 96979, **9-10 (CD Cal. March 21, 2006) (approving a class action). Here, unlike *Dang*, there is no statutory authority or precedent for conferring associational standing for Section 52.1 claims.

Although SJPOA requested leave to amend to remedy the standing defect by adding individual plaintiffs, doing so would not remedy the substantive defects. First, SJPOA concedes that it has only pled Section 52.1 "as a vehicle for redress of constitutional harms" but both plaintiffs assert this is proper, even though the California Supreme Court as well as other state courts have recently articulated the "framework for determining the existence of a damages action to remedy an asserted constitutional violation," which does not include Section 52.1, and have even stated that a constitutional violation on its own would not state a claim under Section 52.1. *Katzberg v. Regents of University of California*, 29 Cal. 4th 300, 307, 317 (2002) (framework for constitutional damages); *Shoyoye v. County of Los Angeles*, 203 Cal. App. 4th 947, 957, 959 (2012) ("in pursuing relief for those constitutional violations under section 52.1," plaintiffs must allege the acts "were accompanied by the requisite threats, intimidation, or coercion"). The one California case AFSCME cited to assert Section 52.1 is "merely" a remedy actually relied on the *Katzberg* line of cases and did not purport to use Section 52.1 to displace that framework for determining damages, if any, for constitutional violations. (AFSCME Opp. at 13:3-5, citing *City of Simi Valley v. Superior Court*, 111 Cal. App. 4th 1077, 1084-1085 (2003).)

Second, as explained in the City's opening brief, plaintiffs cannot allege the "requisite threats, intimidation, or coercion" needed to seek Section 52.1 relief. *Shoyoye,* 203 Cal.App.4th at 957. AFSCME questions the validity of the standard articulated in *Shoyoye* that requires the alleged coercion to be "independent of the alleged constitutional violation," but two federal district courts concluded they were bound to follow *Shoyoye* "'because there is no California Supreme Court decision on point, and no indication that the California Supreme Court would disagree' with the Court of Appeal." (AFSCME Opp. at 11:16-20.) *Luong v. San Francisco* (No. C11-5661 MEJ) 2012 U.S. Dist. LEXIS 165190, 25-27** (N.D. Cal., Nov. 19, 2012) (citing cases).

Both Plaintiffs assert that the Savings Clause, discussed above, provides the requisite, independent coercion, and SJPOA also points to its allegations about employees being given the choice of "standing on their existing pension rights and having their existing salaries reduced … or 'voluntarily' opting into a second tier Retirement Plan with lesser benefits so they can keep their current salaries." (AFSCME Opp. at 12:9-12, citing AFSCME Complaint, ¶ 49; SJPOA Opp. at 12:6-15.) These, however, are the same allegations that support their alleged constitutional violations, including those discussed above, and no attempt is made to differentiate them. Moreover, they are not the type of "coercion" specified in the cases identified by the parties. (See AFSCME Opp. at 12:3-14, quoting *Venegas v. Los Angeles*, 32 Cal. 4th 820, 850-851 (2004), conc. opn. of Baxter, J [portion AFSCME quoted to show the "broad scope" of "coercion" was instead Justice Baxter's vision of "how the statute will soon come to be abused"].)

No California court "has reached the issue of whether allegations of economic coercion are sufficient to state a claim under § 52.1 in any published opinions," and a federal court has refused to "broaden the scope" of Section 52.1 to include "economic coercion" claims. *Schulte v. City of Sacramento* (Case No. NO. CIV. S-05-1812 FCD) 2006 U.S. Dist. LEXIS 4971, *15 n. 7 (E.D. Cal., Feb. 9, 2006) (declining to follow Massachusetts case cited by AFSCME at page 12, note 8). Accordingly, Section 52.1 may not be used here "as a vehicle for redress of constitutional harms." (SJPOA Opp. at 10:16-18.)

E. Pension Protection Act and Separation of Powers Claims are Not Ripe for Adjudication

Pension Protection Act - As plaintiffs concede, Section 1513-A has not been applied, and moreover, the City Council has passed ordinances that *expressly require* the pension boards to apply the section consistently with the California Constitution. (RJN, Exh. B at pp. 1, 8; Supplemental RJN, Exhs. C, D.) As such, plaintiffs are asking this Court to speculate if and how the retirement boards will reconcile Measure B and the Act, there is no "actual controversy," and AFSCME's fifth and SJPOA's eighth causes of action are not ripe. *Pacific Legal Foundation v. California Coastal Com.*, 33 Cal.3d 158, 172-174 (1982); *Building Material & Construction Teamsters' Union v. Farrell*, 41 Cal. 3d 651, 665 (1986) ("when the terms of a statute or charter may reasonably be

interpreted to avoid conflict with a constitutional interpretation, they will be so read").

SJPOA and AFSCME contend in their oppositions that the "actual controversy" requirement also encompasses "future controversy," and that the Court may consider the future controversy now to avoid "lingering uncertainty in the law" on an issue of "widespread public interest in the answer." (SJPOA Opp. at 8:6-28; AFSCME Opp. at 15:5-16.) These contentions were rejected in *Santa Monica v. Stewart*, where the court held that the City's challenge to an initiative ordinance was not ripe, given that 1) the controversy was not yet definite and concrete; and 2) the plaintiffs' "dogged pursuit of litigation to eliminate the lingering uncertainty… is not sufficient to give rise to an actual justiciable controversy." *City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 63-66 (2005) ("It is not sufficient that the issues encompassed by the initiative involve a sizeable public interest"); *Pacific Legal Foundation*, 33 Cal.3d at 170, 172-3 (noted "lingering uncertainty" as a factor, but that factor did not override Court's determination that facial challenge was not ripe).[2]

Separation of Powers - SJPOA asserts that Section 1515-A "usurps the judicial function" by letting the City Council decide, within limits at some point in the future, how to comply with a judgment invalidating an *ordinance* adopted pursuant to Measure B. (SJPOA Opp. at 9:18-28; RJN, Exh. A, § 1515-A(b).) SJPOA is wrong. These cases are not challenging any ordinances (as opposed to Measure B itself), and clearly, any review by this Court would be entirely speculative and result only in an advisory opinion. See *Pacific Legal Foundation*, 33 Cal.3d at 173 (1982) (courts should "not be drawn into disputes which depend for their immediacy on speculative future events").

III. CONCLUSION

For the above-stated reasons, the City respectfully requests that the Court grant the City's motion for judgment on the pleadings.

Dated: January 22, 2013

MEYERS NAVE RIBACK SILVER & WILSON

By: Jennifer Nock
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[2] AFSCME also contends that "'a facial challenge to an ordinance accrues when the ordinance is adopted,'" but this quote was actually the court *paraphrasing the defendant City's limitations argument* – which it ultimately rejected. (AFSCME Opp. at 13:19-14:2, quoting *Coral Const. v. San Francisco*, 116 Cal. App. 4th 6, 26-27 (2004).) In fact, *Coral* found ripeness based "on allegations of a specific application of the [challenged] Ordinance to a bid submitted by Coral, to its injury." *Id.* at 26.